In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 98-643V

Filed: April 2, 2007

MARTHA J. TOOMEY, mother and guardian of JEFFREY A. MCCORD,	*
Petitioner,	*
v.	*
SECRETARY OF HEALTH AND HUMAN SERVICES,	*
Respondent.	*

RULING ON ENTITLEMENT AND DAMAGES ORDER[1]

On August 10, 1998, petitioner, Martha Toomey, filed a petition on behalf of her son, Jeffrey McCord, pursuant to the National Vaccine Injury Compensation Program[2] ("the Act" or "the Program") alleging that Jeffrey's injuries, including encephalopathy and seizures, are the result of the diphtheria-tetanus-pertussis (hereinafter "DPT") vaccine he received on September 13, 1995. Petition at 1. On August 19, 1999, respondent filed a Rule 4 Report denying compensation. Respondent's Report, filed Aug. 19, 1999. To elicit expert testimony, a Hearing was held on April 24, 2006. Petitioner presented Yuval Shafrir, M.D., as an expert witness.

[1] Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" order will be available to the public. Id.

[2] The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. §§ 300aa-10 et seq. (West 1991 & Supp. 2002) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

Respondent presented Joel Herskowitz, M.D., as an expert witness.

After reviewing the entire record and considering the testimony of both experts, and for the reasons set forth below, the court finds petitioner has met her burden of proof required under the Act, and thus is entitled to reasonable compensation. A summary of my findings follows.

The court notes that it benefitted from the testimony of two experts who are both exceptionally well-qualified and highly respected. The undersigned has benefitted from their testimony in previous cases and, in general, finds both experts to be highly credible. However, in this case the undersigned found Dr. Shafrir far more persuasive as he was petitioner's treating neurologist, and he testified consistently with the findings in the medical records. Dr. Herskowitz's testimony, on the other hand, does not address Dr. Shafrir's diagnosis of epileptic encephalopathy, but instead emphasized that Jeffrey had a seizure disorder or infantile spasms. By not addressing the treating doctor's diagnosis and continuing to rely upon his own diagnosis, Dr. Herskowitz's testimony proved to be less helpful and, ultimately, less persuasive in this case.

The undersigned finds that petitioner has met her burden under the three part test of causation articulated in Althen v. Secretary of HHS, 418 F.3d 1274,1278 (Fed. Cir. 2005). The Circuit Court reiterated that petitioner's burden is to produce "preponderant evidence" demonstrating: "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between the vaccination and injury."

Petitioner's medical theory, as Dr. Shafrir testified at the Hearing and discussed in his affidavit, see Petitioner's Exhibit (P. Ex. __) 35: Post Hearing Affidavit, is that "Jeffrey had an immune based chronic encephalopathy with an acute onset within 72 hours after his second DPT vaccination." P. Ex. 35 at 2. His encephalopathy occurred after his second DPT immunization "giving enough time for immune sensitization to occur." Id. Further, Dr. Shafrir testified that it is a well-documented medical theory that DPT can cause encephalopathy and Dr. Herskowitz agreed. Transcript (Tr.) at 36, 141. Moreover, the Vaccine Injury Table recognizes that the DPT vaccine can cause encephalopathy. Petitioner's Reply to Respondent's Brief (P. Reply) at 2-3. Dr. Shafrir testified that his theory comprised a logical sequence of cause and effect that Jeffrey's epileptic encephalopathy was caused by the DPT vaccination. Tr. at 34. He testified that Jeffrey's epileptic encephalopathy is a type of syndrome "associated with seizures with EEG abnormalities and with diffused impairment of brain function with direct or indirect relation to the seizures." Id. at 34-35. In some of these conditions, "the seizure [itself] can be relatively minor and the child can still suffer severe neurological impairment . . . ." Id. at 35. Additionally, Dr. Shafrir testified that "a significant amount of epileptic encephalopathies are immune related and in this case we see it quite dramatically." Id. Specifically, Jeffrey had an initial encephalopathy after his vaccination and then his condition deteriorated. Id. at 36; P. Ex. 35 at 2. Finally, there is a "striking temporal relationship" between the vaccination and onset. Petitioner's Posthearing Brief at 5. Dr. Shafrir testified that Jeffrey's epileptic encephalopathy

started forty-eight hours after his DPT vaccination. Tr. at 34. Moreover, the EEG that was performed on September 18, 1995, five days after vaccination, shows that Jeffrey was encephalopathic. Tr. at 42-43, 51; P. Ex. 5 at 52.

Both Drs. Shafrir and Herskowitz agree on the following: DPT can cause encephalopathy; Jeffrey's EEG indicated he was encephalopathic; Jeffrey was initially diagnosed with and had Laundau Kleffner Syndrome when he came under the care of Dr. Shafrir, Tr. at 105; his condition deteriorated and he developed a regression of language skills, Tr. at 105; whatever caused Jeffrey's initial abnormal EEG and seizures is the cause of his continued developmental and neurological problems, Tr. at 126, 131; and the seizures Jeffrey experienced after the DPT vaccination were afebrile.

However, they disagree on the onset of his seizures and encephalopathy - Dr. Shafrir testified it was forty-eight hours after vaccination and Dr. Herskowitz testified that the seizures preceded the vaccination by four days or even a month. Tr. at 109; Respondent Exhibit (R. Ex. __) C at 1: Post-Hearing Supplemental Report . Dr. Herskowitz also testified that Jeffrey had infantile spasms, Tr. at 116, and Dr. Shafrir testified that Jeffrey's EEG is "not compatible with infantile spasm." Tr. at 152. Finally, Dr. Herskowitz disagreed that Jeffrey suffered an acute encephalopathy after his DPT vaccination because one would expect to see a continuous decline in his development when in fact Jeffrey experienced a period of normalcy for several months and had normal development. Tr. at 131. Dr. Shafrir testified that the reason Jeffrey developed normally was because he was on an immunosuppressant, ACTH, to control his seizures, and further, Jeffrey's EEG was never normalized by ACTH. P. Ex. 35 at 2; Tr. at 78, 161. These arguments will be discussed briefly.

Dr. Herskowitz believes Jeffrey's seizures preceded his vaccination. R. Ex. C at 1. He notes that contemporaneous medical records document three treaters recording "the onset of seizure-like spells" four days prior to immunization. Id. However, he conceded that there is no actual diagnosis of any erratic behavior in the medical records prior to Jeffrey's vaccination on September 13, Tr. at 121, and there are no medical records that note any concern by the parents e.g. telephone calls to doctors or emergency room visits that would indicate Jeffrey had seizures prior to vaccination. Id. at 149. Dr. Shafrir testified that he did not put much weight on the medical student's note of one week history of seizures because they do not have the training to identify the onset of seizures. Id. at 58. The pediatrician who saw Jeffrey on September 17, 1995 clarified her notes by filing an affidavit stating that she saw no evidence in the medical records that seizures clearly preceded DPT. P. Ex. 14 at 1. She was not sure if the neurologist who later saw Jeffrey, Dr. Watkin, picked up on her note that she thought the parents were describing "prolonged moro reflex" and not seizure activity. Id. Dr. Watkin noted that Jeffrey's seizures have increased since his vaccination, but "clearly preceded the DPT shot." P. Ex. 5 at 30. Dr. Shafrir testified that Dr. Watkin does not state what he bases his conclusion on. Tr. at 60. Further, Dr. Shafrir testified that Dr. Watkin's records in general are not very accurate in their description and contradict other medical records. Id. The undersigned agrees with Dr. Shafrir that these three instances do not demonstrate that Jeffrey had seizures prior to his

September 13 vaccination.

Dr. Shafrir testified that Jeffrey did not present to him with infantile spasms and indicated this when he first examined him. Tr. at 152. He stated that Jeffrey had focal tonic seizures which can progress to infantile spasms, but Jeffrey "never had the classical infantile spasms under any stretch of the imagination." Id. at 153. He also testified that the movements children make who have infantile spasms, which Dr. Herskowitz described, were not the type of seizures that Jeffrey had. Id. Dr. Watkin, Jeffrey's first neurologist, treated Jeffrey with ACTH, an immunosuppressant, which Dr. Herskowitz testified is used for treating infantile spasms. Tr. at 103. Dr. Shafrir testified that there is nothing specific about ACTH to treat infantile spasms. Id. at 154. He testified that ACTH can be used to treat other forms of seizures including Laundau Kleffner and other epileptic encephalopathies. Id. The undersigned finds that Dr. Shafrir's testimony is more convincing and correlates with the medical records with regard to Jeffrey not having infantile spasms.

Dr. Shafrir agrees that once Jeffrey was given ACTH in October 1995 the seizures stopped, his development greatly improved, and he was meeting his developmental milestones. Tr. at 78. However, ACTH causes severe side effects, including high blood pressure which Jeffrey had. Id. at 48. Thus, the ACTH was discontinued in February 1996. Once the treatment ended, Jeffrey's seizures came back and he was not doing well developmentally. Id. at 78-79. Dr. Herskowitz testified that if Jeffrey suffered an encephalopathy as Dr. Shafrir indicated there would be a fall off in head growth and a fall off in development. Tr. at 115. However, there was no fall off and he was developmentally well at twelve months and thirty months of age. Id. Dr. Shafrir testified that at twelve months of age, Jeffrey was still on ACTH. Id. at 161. Thus, Dr. Shafrir believed that Jeffrey's encephalopathy responded to the immunosuppressants and allowed him to continue developing. At thirty months of age, Jeffrey had been off of the ACTH for one month. Id. At that time his seizures reappeared, "although his development kept." Id. However, as in other patients with Jeffrey's condition, once the seizures come back, development begins to decline. Id. at 162. In Jeffrey's case, he developed other forms of seizures and suffered severe developmental regression. P. Ex. 35 at 2.

As a final observation, petitioner points out that respondent characterizes Jeffrey's injury as a seizure disorder. P. Reply at 6. In fact, Dr. Shafrir consistently testified that Jeffrey has an epileptic encephalopathy and the two are not interchangeable. Id. An epileptic encephalopathy is a group of disorders "clinically defined and identified by association with abnormal EEG readings, diffused impairment of brain function with direct or indirect relation to seizures." Id.; see also Tr. at 35. Further, the presence of febrile or afebrile seizures does not negate the diagnosis of epileptic encephalopathy or its cause. P. Reply at 6. Part of respondent's argument that the DPT vaccination did not cause Jeffrey's injury is because he had afebrile seizures. Respondent's Posthearing Brief at 9. Both experts agreed that there is a lack of evidence linking DPT to afebrile seizures. However, it is not petitioner's position that the DPT vaccine caused Jeffrey's seizures. Petitioner's theory of causation is that Jeffrey had "an immune based chronic encephalopathy" which was triggered by DPT. Whether or not Jeffrey had seizures is not

essential to the diagnosis of epileptic encephalopathy since it "is a clinical entity with multiple presentations and multiple etiologies. It is characterized by the presence of EEG abnormalities and frequently (but not always . . .) the presence of seizures." P. Ex. 35 at 3.

In summary, this was a complicated medical case presented through two highly qualified, very credible experts. It should be noted that Dr. Shafrir, Jeffrey's treating physician, has testified previously in the past for respondent. In weighing their testimony, the undersigned gives the edge to Dr. Shafrir because the issues involved are enmeshed with the diagnosis and treatment of Jeffrey -- issues about which the treater has the superior knowledge and understanding. While each doctor was, as expected, equally conversant with the general medical issues, Dr. Shafrir was more persuasive in the application of the general medicine to the facts and circumstances of this case. This is not surprising since Dr. Shafrir possessed superior knowledge of this case as the treater. This is a close case involving a complex medical picture. However, in the final analysis and based upon Dr. Shafrir's convincing testimony, the undersigned finds that petitioner has thus met her burden by meeting all three prongs of Althen and successfully rebutting respondent's arguments.

Having determined that petitioner is entitled to compensation under the Vaccine Act, this case is now ready for the damages phase. This Order provides guidance and a schedule for resolving the damages portion of this case. Section 1 provides general information; Section II describes necessary supportive materials for the Life Care Plan; and Section III sets the schedule for the damages process. **The parties should carefully read the General Statement below as it discusses modifications to the court's previous Damages Orders[3]; the parties in this case will be responsible for complying with these modifications.**

I. GENERAL STATEMENT

In Vaccine Act cases, damages issues are typically resolved by a process in which petitioner begins by obtaining a "life care plan" that sets forth petitioner's future needs. The respondent then evaluates that plan and when desired, obtains its own life care plan. The parties then attempt to settle any differences. If they are successful, they file a stipulation. If they have not settled some or all of the issues, the special master typically conducts a hearing to hear evidence and resolve the disputed issues.

The court does note, however, that in a number of cases two other approaches to resolve damages issues have been utilized. **With the court's approval**, the parties may:

-- use a single life care planner to determine the injured's needs; or

-- use alternative dispute resolution (ADR). ADR is normally sought after the parties' initial settlement attempts have been unsuccessful. The court will assign

[3]The court modified its Damages Order in September 1997.

an independent special master to assist the parties in reaching agreement. The procedures used vary to meet the needs of a particular case. The only requirement is that the process be completed quickly (anticipated time is less than one month) so that if unsuccessful, case resolution will not be delayed.

- - **NOTICE TO PETITIONERS' COUNSEL**

It is the experience of the special masters that the settlement process has in many Program cases taken far too long - - sometimes two years or more from resolution of the entitlement issue - - to the financial detriment of the injured party. Since the largest item of damages is post judgment care, it is in petitioner's best interest to resolve the damages issue as expeditiously as practicable. Indeed, in Program cases involving vaccinations administered prior to October 1, 1988, a petitioner receives no compensation whatsoever for any expense predating the date of judgment. Even in cases involving vaccinations administered after October 1, 1988, the judgment date is extremely important since prejudgment reimbursement is limited to what was actually expended, while the post judgment award is determined on the basis of what the injured reasonably requires for future care.

In many cases, the primary delay in resolving the damages issue is petitioner's failure to file its Life Care Plan in a timely manner. Aggravating the delay is the discovery that petitioner failed to file the information required by this Order, infra, in support of the compensation requested, such as medical and school records, medical insurance information, and provider information. The next area of delay is counsel allowing the settlement negotiation process to drag on interminably. Settlement should truncate the process, not prolong it. These delays are unnecessary and work a substantial injustice on your client. Counsels' goal must be to supply as quickly as possible all relevant information, as set forth in this Order, and to speedily determine whether a fair settlement can be negotiated. If a settlement can be reached, petitioner's counsel must work with respondent and the court to conclude the stipulation process as quickly as possible. If settlement appears unlikely, counsel must recognize that fact and schedule a hearing. The special master can then resolve the case.

In short, the damages process moves either quickly or slowly based primarily upon petitioners' counsel's efforts in supplying the required information and in pushing the settlement and/or hearing process. The special masters are prepared to assist the parties in quickly resolving the damages issues through whatever form of intervention the parties recommend.

One way the court has intervened to move the damages process forward has been by modifying the standard Damages Orders. The court has utilized a standard Damages Order for several years now; however, in an effort to determine damages in a more efficient manner, without infringing upon either side’s ability to support its case, the court has modified the Damages Order by specifically amending section “III. Schedule” of its Damages Order. In the

past, the court has required respondent to request additional information (i.e. IME, personal site visit, etc.) within thirty (30) days after the service date of petitioner's life care plan. However, effective immediately, this thirty (30) day requirement for additional information is eliminated and replaced by the requirement of a status conference, which is to be conducted within forty-five (45) days after the filing of this Damages Order. **The parties are advised to carefully read "III. Schedule" of the attached Damages Order which has been revised to reflect the court's modifications.**

The purpose of the conference call is to discuss the requirements of the Damages Order. Particularly, the discussion will focus on the petitioner's duty to provide supporting information for the compensation requested. In addition, however, the respondent's need for additional information will be discussed as well. Thus, the respondent's request for an IME, site visit, additional medical records, or other information, will be examined and a schedule set. In essence, respondent is expected to gather information for its responsive life care plan on a parallel track with petitioner. This should reduce substantially the time involved in moving the case to settlement or trial. The court is aware that respondent faces a handicap in preparing its responsive life care plan before it has received petitioner's detailed request for compensation. However, respondent should be prepared to request as much information as possible at this status conference, and the court will proceed with the understanding that respondent may need to request additional information after receipt of petitioner's life care plan. Lastly, alternative methods of resolving the dispute (e.g. ADR, single life care planner) will be discussed. Hopefully, at the close of this call, all concerned will have a clear picture of how the case will proceed and in what time frame. An open and frank discussion is expected.

For this effort to be successful, the parties must cooperate in identifying informational needs, gathering this supplemental documentation, and coordinating any medical testing or site visits. To that end, the court expects counsel, possibly with their respective life care planners, to discuss the case prior to the conference call with the court and to be prepared to set a schedule for obtaining information so as to facilitate the submission of complete and timely life care plans. This procedure will place a heavy burden on the parties at the onset of this damages phase, but should result in significant benefits from this early discussion and cooperation.

Additionally, two areas of state law should not be overlooked during the damages phase: Medicaid and legal representation.

1. **Medicaid** -- If the injured vaccinee has been covered by Medicaid at any time since the onset of the vaccine-related injury, the court strongly encourages the petitioner to contact the State Administrator of the Medicaid program to ascertain whether the state currently has or will have an interest in or lien on the compensation awarded by this court to the petitioner. ***States have filed liens, after judgment in some Program cases, to recoup past Medicaid payments. If no compensation is provided for past Medicaid expenditures and the state is successful in the litigation, petitioner's award could be substantially reduced in***

satisfying the lien. Accordingly, petitioner's counsel should work with respondent's counsel and the state Medicaid office to determine any continued Medicaid coverage and any reimbursement of Medicaid for past expenses. §300aa-15(a)(1)(B).

2. **Representation Issues** -- Under the laws of most states, it is required that the person who is to receive the payments on behalf of the injured person must be formally appointed as guardian or conservator of the injured person. ***This is true even in the case of the parents of a minor child. Therefore, petitioner's counsel should determine now whether such an appointment will be necessary in this case.*** If the guardianship or conservatorship is required in order to receive the Vaccine award, the cost of establishing the guardianship or conservatorship will ordinarily be reimbursable as part of petitioner's attorney's fees and legal costs.[4]

The court strongly encourages informal resolution of damages issues. To facilitate the settlement process, the court encourages counsel to arrange for direct communications between damages experts to discuss the injured's condition, the requested needs, and what information or concerns are seen as outstanding.

The court also recognizes that legitimate disagreements will require judicial resolution. **The court's goal is simply to guide the parties as quickly as possible into a position where they either agree to settle or agree to disagree and go to trial.** Either avenue ensures timely case resolution and efficient use of resources.

To assist petitioner in preparing a properly supported Life Care Plan, Section II of this Order sets forth below the types of information that is usually necessary to support a damages claim.

II. THE LIFE CARE PLAN

The life care plan shall contain the following information:[5]

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[4]See, e.g., Thomas v. Secretary of HHS, No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. Feb. 3, 1997) (conservatorship costs compensable under the "but for" test; i.e., the costs in establishing a conservatorship would not have been incurred "but for" the court's demand that a conservatorship be set up to protect the Program award); Velting v. Secretary of HHS, No. 90-1423V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996) (compensation for work spent establishing a conservatorship with the local probate court reasonable because the conservatorship was set up for the *sole purpose* of handling the Program award).

[5]In past cases, the court has dictated that the life care expert's hourly rate should not exceed $100 per hour, with a total cost, including plan design and subsequent trial testimony, not (continued...)

1. **Background Information.** The plan shall list the sources of information that were used to determine the level of future care for the injured (e.g., conversations with the family, past levels of care, a current medical evaluation, school assessments, and discussions with the treating physicians). The plan shall state specifically petitioner's current types of treatment. If petitioner's request for future care differs from the current types of care, the plan shall explain why the different treatment is necessary. **Petitioner shall file copies of any current medical exam, individualized education plan (IEP), and individualized habilitation plan (IHP)**. Depending on the type and extent of compensation being requested, petitioner may file a **video** tape depicting a day in the life of the injured (15-20 minutes of a home-quality video is sufficient). Such videos have proved extremely helpful in resolving damages issues.

2. **Residential Services.** If residential services are requested, the following questions should be answered:

   - how was the requested level of care determined?

   - what facilities providing that level of care are available in the relevant state or region? (names of contact persons and phone numbers for the facilities should be provided if possible).

   - which facilities were investigated and how were these facilities identified? If a description of the injured was given to the facility to determine

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[5](...continued)
exceeding $3,000 on average, and in the most difficult cases, not exceeding $4,000. As a consequence of these limits, petitioner was forewarned of his/her responsibility to monitor life care expert fees. See Cousins v. Secretary of HHS, No. 90-2052V, 1992 WL 58809 (Cl. Ct. Spec. Mstr. Mar. 9, 1992); see also Crossett v. Secretary of HHS, No. 89-73V (Cl. Ct. Spec. Mstr. Aug. 28, 1990)(unpublished). However, due to the increasing role of the life care planner, not only in their compilation and preparation of the life care plan and its supporting documentation, but also in plan revisions and settlement negotiations, the court recognizes that the specific monetary limitations previously placed on expert fees is no longer reasonable. Nevertheless, the petitioner is still responsible for monitoring life care planner fees. In addition, the court will continue to require that petitioner substantiate the reasonableness of the expert's hourly rate, the number of expert hours expended, and the specific services provided in the case. The court has allowed varied hourly rates for life care planners depending on the level of expertise, the difficulty of the case, and the planner's geographic area of practice. Without specific documentation indicating that the expert's fees are reasonable under the case circumstances, the court may deny unexplained and unreasonable charges in the fee request. See Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997).

appropriate placement, please provide that description (frequently, disputes over the appropriate facility center on the accuracy of the description of the injured given to the facility).

For each facility considered, the following information should be provided:

- the cost;
- the services included in the cost with a description of the level of these services;
- the reasons for rejecting any facility.

3. **Attendant Care.** If attendant care is requested, provide the following information (or address the following issues):

- why the attendant care is necessary (e.g., respite care versus medical monitoring);
- how the number of hours was determined;
- the reasons for the skill level of attendant requested;
- the cost and how it was determined.

4. **Medical Care.** For requested examinations, medications and medical tests, provide the following information:

- the basis for the request (physician recommendation, current usage, etc.);
- whether the level of need will reduce with age;
- the cost and how it was determined.

5. **Therapies.** For each type of therapy or counseling requested, provide the following information:

- the frequency;
- the basis for the request (physician recommendation, current usage, etc.);
- whether the therapy is currently being provided;

- whether the therapy is provided by the school district through the Education of Individuals with Disabilities Act, 20 U.S.C. 1400 et seq. (1990) and, if not, why not;

- the cost and how it was determined.

6. **Miscellaneous Items.** For any miscellaneous items (home modifications, equipment, transportation, etc.) provide the following information:

   - the basis for the request;

   - the cost and how it was determined.

7. **Offsets.** Identify and quantify any services currently being rendered by state or local agencies, school districts, private charities, etc. Identify and quantify any sources of financial aid currently or potentially available to offset the requested costs (private insurance, state and federal programs, etc.). It should be noted whether such benefits will be affected by an award under this Program.

8. **Method of Payment.** Petitioner shall also provide the court and respondent its position on how the award should be paid: through an annuity, lump sum, or some combination thereof. Legitimate arguments have been made in support of each of the above methods of payment, but, in general, the court has found that a combination of lump sum and annuity meets the legitimate interests of both parties. Petitioner shall discuss these issues with the court in a status conference prior to incurring any expert fees (e.g. economist's fees) with respect to this "method of payment" issue.

   Extremely important is the issue of the appropriate discount rate for any lump sum and the growth rate for any annuity. Based upon testimony presented in past cases, the court routinely awards discount rates of:

   0% - medical items
   2% - non-medical items
   1% - rough average for all items of care

   and growth rates of:

   6% - medical items
   4% - non-medical items
   5% - rough average for all items of care.

   If the parties do not take issue with these rates, expert testimony will not

be necessary. Also it must be noted that while these rates have been found by the court in past cases, the parties are free to negotiate different rates as part of any settlement or stipulation.

9. **Trusts.** Petitioner should be aware that the court is more and more frequently seeing awards structured in the form of trusts. Respondent actively advocates the use of trusts in many cases. While the court is concerned with the oversight and management of large dollar awards, the court sees trusts as beneficial in some, but not all cases. Other forms of oversight should be considered, including guardianships and conservatorships. The court generally defers to the parties' joint agreement on such issues, as long as it is shown that the method selected is in the best interests of the injured party, is not unduly burdensome, and is cost effective. To prevent the issue of trust formation, or other form of award oversight, from causing undue delay in the damages portion of the case, **the parties shall alert the court as early in the damages process as possible** of either or both parties' intention to utilize a trust or other form of oversight.

III. SCHEDULE

The parties shall comply with the following schedule to complete the damages portion of this case:

A. **MANDATORY CONFERENCE CALL:** Within **forty-five (45) days** following the filing of this Order, by **May 18, 2007**, petitioner shall schedule a conference call in this case. Petitioner shall confer with respondent and then contact the court by **May 4, 2007** to suggest three possible dates and times for the initial status conference to be held in this case. Petitioner shall contact my law clerk, Tricia Tipon, at (202) 357-6343, to schedule this call.

- **PURPOSE OF THE CALL**:

  1. Petitioner may use this conference call to ask the court any questions about the damages phase of the proceedings.

  2. The court expects petitioner and respondent to work ***simultaneously*** on preparing life care plans. Respondent should not wait for petitioner to file a life care plan before beginning work on her life care plan. Therefore, if respondent believes additional information will be necessary for completing her life care plan (i.e.,

IME, personal site visit,[6] updated records, etc.), respondent shall be prepared to discuss these requests at the status conference. **Failure to request the information at the status conference may result, *absent substantial justification*, in denial of any such future request.**

B. **PETITIONER'S LIFE CARE PLAN**: Petitioner shall file a life care plan or a status report detailing his/her efforts to obtain a life care plan within **ninety (90) days,** by no later than **July 2, 2007**. If a status report is filed, then additional status reports shall be filed **every thirty (30) days thereafter** until the life care plan is filed. If the LCP is not filed within six months after the date of this Order, petitioner shall schedule a status conference with the court to explain fully the delay in producing the LCP.

C. **RESPONDENT'S LIFE CARE PLAN**: Respondent shall file its response within **forty-five (45) days** after the service date of petitioner's plan (unless otherwise modified by the court). Such response shall include, in addition to or as part of the narrative explaining projected levels of care, a **comparative chart** of the parties' respective requests.

D. **JOINT STATUS REPORT**: Petitioner shall file a joint status report within **sixty (60) days** after the service date of respondent's plan. The report shall detail the parties' settlement efforts to date.

E. **DAMAGES HEARING**: While continuing settlement negotiations, petitioner shall confer with respondent and contact the court with three proposed dates and times for a status conference to be conducted within **forty-five (45) days** after the filing date of the joint status report. At the status conference, the parties shall be prepared to discuss:

- the issues to be resolved at the hearing;
- a proposed hearing date to occur no later than ninety (90) days after the status conference;
- the proposed hearing site; and

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[6]Petitioner should be aware that respondent, in preparing its response, may need to conduct an on-site evaluation of the injured or to contact the injured's providers cited in the life are plan. In either case, respondent's counsel is strongly encouraged to provide prior notice to and make appropriate arrangements with petitioner's counsel. If any questions or disputes arise, the court should be notified immediately.

- the witnesses that each party plans to call at the hearing and whether any of the witnesses will testify telephonically.

IV. CONCLUSION

This Order is meant to be a framework for resolving damages issues. Any and all provisions of the Order are subject to modification pursuant to a Motion, preferably made jointly, supported by a reasonably detailed explanation. However, the court sees this schedule as a reasonable time frame within which the parties can settle their case or to focus their case for trial. **Absent extraordinary circumstances** brought to the court's attention in a timely manner, the parties are expected to adhere to this schedule.

If either party has any questions about this Order, the court's procedures or any other aspect of the damages process, that party should contact my law clerk, Tricia Tipon, at (202) 357-6343, to arrange for a status conference to discuss those questions.

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Chief Special Master